Supreme Court, U.S.
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No. 96-1964

In The

Supreme Court of the United States

October Term, 1996

JAMES A. MERRIAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES A. MERRIAM, HAROLD B. HAYES, and WILLIAM R. SHEPPARD, Defendants.	No. C 95-0245 FMS ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ON DOUBLE JEOPARDY GROUNDS (Filed Jan. 3, 1996)

Defendants James A. Merriam ("Merriam") and Harold B. Hayes ("Hayes") have moved to dismiss the charges against them on the ground that the Superseding Indictment charges conduct for which Merriam and Hayes have already been punished, in violation of the Double Jeopardy Clause of the Fifth Amendment.[1]

For the reasons set forth below, the Court finds that the instant prosecution of Merriam and Hayes does not violate their Fifth Amendment rights.

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[1] The Double Jeopardy Clause provides: "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. 5.

Background

On July 5, 1995, the original indictment in this prosecution was returned by the grand jury. The superseding indictment ("indictment") was returned July 26, 1995. The indictment charges violations of 18 U.S.C. §§ 371 (conspiracy), 1343 (wire fraud) and 2 (aiding and abetting). In addition, violations of 15 U.S.C. §§ 78j and 78ff (securities fraud) are alleged. The indictment alleges that Merriam, Hayes, and William Sheppard ("Sheppard") conspired from approximately March, 1990 until at least August 6, 1990 to drive up the price of stock in a company founded and controlled by Merriam. The Vintage Group, Inc. ("Vintage").

I. SEC Enforcement Action Against Merriam

On March 7, 1994, the Securities Exchange Commission ("SEC") filed a civil action in this court against Merriam and Vintage concerning Vintage and the sale of its stock. The complaint alleged securities fraud in violation of § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b); materially false filings with the SEC in violation of § 13(a) of the Securities Exchange Act, 15 U.S.C. § 78m(a); sale of unregistered securities in violation of §§ 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c); failure to make and keep required books, records, and accounts in violation of § 31(a) of the Investment Company Act, 15 U.S.C. § 80a-30(a); and breach of fiduciary duty in violation of § 36(a) of the Investment Company Act, 15 U.S.C. § 80a-35(a). The SEC complaint did not include a claim for conspiracy.

The SEC action was resolved by agreement on October 20, 1994. Merriam executed a consent to the entry of judgment, and judgment was subsequently entered against him. Pursuant to that judgment, Merriam was permanently enjoined from participating in the securities industry in certain capacities and from violating each of the statutes and rules relied upon by the SEC in its complaint. The judgment also stated that the court would retain jurisdiction over the SEC action in order to entertain any suitable application or motion for additional relief within the jurisdiction of the court, as well as to fix the amount of a disgorgement order against Merriam. No monetary penalty or disgorgement was ever ordered, however; civil penalties and disgorgement of Merriam's illegal profits was waived due to Merriam's financial inability to pay.

II. NASD Proceedings Against Hayes

On March 6, 1992, the Market Surveillance Committee ("MSC") of the National Association of Securities Dealers ("NASD") issued a formal complaint against Hayes and Sheppard, among others. The complaint centered on certain trading activities relating to the sale of Vintage stock that occurred in 1990. The complaint alleged violations of the securities laws and the NASD's Rules of Fair Practice.

After an evidentiary hearing, the MSC concluded that Hayes had violated: (1) Section 10(b) of the Securities Exchange Act, (2) Sections 1 and 18 of the NASD's Rules of Fair Practice, (3) Regulations T and X of the Federal Reserve System, and (4) Regulation E of the Securities

Act. The MSC censured Hayes, imposed a fine of $300,000,[2] and barred him from associating with any member of the NASD in any capacity.

Hayes appealed the MSC's decision to the NASD National Business Conduct Committee ("NBCC"). The NBCC affirmed the decision of the MSC, including the MSC's decision regarding sanctions, with respect to which the NBCC noted:

> We believe that the sanctions assessed against Mr. Hayes in this matter are appropriate, in light of the gravity of his violations. We note that Hayes made a profit of $277,000 in connection with his participation in the manipulative activity, and that Hayes' arguments as to mitigation are without merit. We believe that a bar on all capacities is warranted in this matter due to the egregious nature of the violative activity, and to protect the investing public against this form of manipulative activity by those in the security industry who have a fiduciary obligation to their customers.

The NBCC also imposed on Hayes the costs of appeal. Hayes applied for review of the NASD's disciplinary action to the SEC, which affirmed in large part the orders entered by the NASD.[3] The SEC affirmed the sanctions imposed by the NASD, stating that "Hayes' conduct in

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[2] The MSC had concluded that Hayes had realized profits of approximately $277,000 from his fraudulent activity.

[3] The SEC affirmed the NASD's findings of violations in all respects save one, which it set aside.

this case was extremely serious. . . . The NASD's imposition of the orders of censure, fine, and bar are warranted."

Discussion

I. The Law of Double Jeopardy

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The third of these protections is at issue here.

In order to determine whether the instant prosecution constitutes double jeopardy, the Court must consider (1) whether the sanctions issued in the earlier proceedings are punishment for purposes of double jeopardy analysis, and (2) whether the offenses for which defendants were initially sanctioned are the same offenses as those for which they are being prosecuted in this case.

In *United States v. Halper*, 109 S. Ct. 1892, 1901 (1989), the Supreme Court described the circumstances under which a civil penalty constitutes punishment for purposes of double jeopardy. The Court held that

> the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as

> well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction *to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.*

109 S. Ct. at 1902 (emphasis added).[4] Under this test, the sanctions previously imposed on Hayes and Merriam do not constitute punishment for purposes of the Double Jeopardy Clause.

II. Bar

Bars similar to those imposed here have repeatedly been found to serve remedial purposes. For example, in *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992), the defendant-broker had previously been barred from trading. The Seventh Circuit held that the bar was not punitive in nature; rather, "the decision to exclude [defendant] from any contract market can be seen as an action to ensure the integrity of the markets and protect them from people like [defendant]." *Id.* at 844. Similarly, in *United States v. Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979), the Eight Circuit concluded that an order permanently barring an individual from acting as a broker-

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[4] Whether the civil penalty occurs before or after the criminal prosecution is irrelevant to a double jeopardy analysis. *See United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991).

dealer in the securities industry was not punitive, but rather "a remedial act to protect the public," *id.* at 812, and therefore was not a bar to subsequent punishment for the same conduct. For the reasons expressed in these cases, the Court finds that the lifetime bars imposed on defendants were remedial in nature and did not constitute punishment for purposes of the Double Jeopardy Clause.

III. Monetary Sanction

Disgorgement, too, is a remedial rather than punitive sanction. *See SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (because disgorgement order does not ask defendant to "give up anything in excess of the amount of his illicit gains," it is not punitive but rather "remedial in nature"); *United States v. Teyibo*, 877 F. Supp. 846, 863 (S.D.N.Y. 1995) (disgorgement of profits gained and losses avoided that resulted from fraudulent activities "does not serve any goals of punishment such as retribution and deterrence" and is therefore not punishment for double jeopardy purposes).

In addition, where a monetary sanction exceeds the amount of illicit gains, but roughly approximates the expenses incurred by the government or agency in pursuing the case, the reimbursement does not constitute punishment for double jeopardy purposes. For example, in *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992), a $75,000 fine was deemed remedial. The Court held that where a fine bears a "rational relation" to the expenses the government incurred in investigating and prosecuting the fined criminal, and where the fine is not

disproportionate to the illegal conduct, the fine is not punitive. *See also United States v. Teyibo*, 877 F. Supp. 846 (S.D.N.Y. 1995) ($100,000 compensation for costs incurred in investigating and prosecuting civil action "does not serve any goals of punishment such as retribution or deterrence").

Here, the only monetary sanction was imposed on Hayes, who was fined $300,000. The NASD explicitly found that Hayes' illegal profits totalled approximately $277,000. In response to the Court's request for an accounting of the investigative costs incurred by the NASD in connection with its investigation of Hayes, the government has submitted the declaration of Halley Dunn Milligan ("Milligan"), an employee in the Market Surveillance Department ("MSD") of the NASD. Milligan worked both as an investigator and a supervisor in the investigation of the trading activity in Vintage.

The NASD has not maintained written documentation regarding the costs incurred in the investigation. Furthermore, Milligan explains that one large investigation was conducted with regard to the activities of several parties, including Hayes, rather than a separate investigation into Hayes alone. Milligan states, however, that "Hayes was a major player in the investigation, and the MSD's efforts were centered on him and Sheppard. As such, a large percentage of the time spent and other costs incurred in the . . . investigation can be attributed to the investigation of Hayes." Moreover, Milligan specifically states that a number of the tasks undertaken by the NASD were directly related to Hayes.

According to Milligan's approximations, the NASD's total costs incurred during the investigation range from $70,259 to $82,358.37. Given Milligan's assertion that a large percentage of the time spent and other costs incurred in the investigation can be attributed to the investigation of Hayes, the Court is satisfied that the $23,000 difference between the monetary sanction imposed upon Hayes ($300,000) and his ill-gotten gains ($277,000) is rationally related to the investigative costs associated with the NASD's investigation of Hayes.

Hayes contends that the accounting of the investigative costs incurred by the NASD is deficient, insofar as the figures "derive from the memory of one analyst, are unsupported by documentation, are rife with guesses and generalizations and do not specifically relate to Hayes individually." The Court disagrees. The *Halper* court recognized that assessing a remedial sanction is not an exact science, but rather involves an element of "rough justice." *Halper*, 490 U.S. at 449. Even if a very small percentage of the total investigative costs detailed by Milligan were attributable to Hayes, the Court would be satisfied that the $300,000 monetary sanction was an attempt to estimate the amount of illegal profits obtained by Hayes; although "rough justice" this may be, it is justice, nevertheless. The $300,000 monetary sanction was therefore remedial in nature.

III. Conclusion

For the foregoing reasons, the Court finds that the sanctions imposed by the SEC and NASD against Merriam and Hayes do not constitute punishment for purposes of the Double Jeopardy Clause.

IV. *United States v. $405,089.23 U.S. Currency*

Defendants argue that the Ninth Circuit's recent decision in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted* (Jan. 12, 1996) ("*405*"), dictates a contrary result. The Court disagrees. In *405*, the court considered whether civil forfeitures can constitute punishment for double jeopardy purposes. Quoting dicta from *Halper*, the *405* court enunciated the *Halper* "test" as follows: " 'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 33 F.3d at 1219. Also departing from *Halper*, the *405* court employed a "categorical" rather than an "as applied" analysis to determine that civil forfeitures can indeed constitute punishment. That is, the court rejected the idea announced in *Halper* that the punitive nature of a particular sanction should be determined on a case-by-case basis; instead, the court opted to "look to the entire scope of the statute which the government seeks to employ." *Id.* at 1220.

Defendants urge the Court to adopt *405*'s categorical approach and to look to the punitive nature of SEC enforcement actions and sanctions in general, rather than that of the specific sanctions imposed here. Furthermore,

defendants contend that unless the court finds that the sanctions imposed on Hayes and Merriam were *solely* remedial, the law of the Ninth Circuit requires the conclusion that prior proceedings against Hayes and Merriam constitute punishment for double jeopardy purposes.

Defendants interpret *405* too broadly. The decisions in both *405* and the case upon which *405* relies, *Austin v. United States*, 113 S. Ct. 2801 (1993), deal with the unique context and statutory history of civil forfeitures. *See Austin*, 113 S. Ct. at 2811, n.14; *405*, 33 F.3d at 1220. Furthermore, all courts in the Ninth Circuit that have adopted the reasoning of *405* have done so only in forfeiture cases. *See, e.g., United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994); *United States v. Chick*, 61 F.3d 682 (9th Cir. 1995); *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994); *United States v. Stanwood*, 872 F. Supp. 791 (D. Ore. 1994).

Because the Court finds that *405* is not dispositive, it looks to *Halper* for the appropriate standard by which to determine whether the sanctions previously imposed on defendants constitute punishment. For the reasons discussed above, the Court holds that they do not.[5]

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[5] Because the Court holds that the sanctions imposed on defendants in the earlier proceedings do not constitute punishment for double jeopardy purposes, it need not consider whether the offenses for which defendants were previously punished are the "same" as those for which they are being prosecuted in this action. Additionally, the Court need not consider the government's argument that Merriam waived his right to contest this action on double jeopardy grounds when he entered into the civil settlement with the SEC.

Defendants' motions to dismiss based on double jeopardy grounds are therefore DENIED.

SO ORDERED.

Dated: January 29, 1996

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge